(4) The term "qualifying advertising" means any type of advertising specified by the Commission under subsection (d)(3)(A).

TECHNICAL AMENDMENTS

SEC. 1234. (a) Section 396(g) of the Communications Act of 1934 (47 U.S.C. 396(g)) is amended by striking out paragraph (5) thereof, and by redesignating paragraph (6) as paragraph (5).

(b) Section 397(15) of the Communications Act of 1934 (47 U.S.C. 397(15)) is amended by striking out ", Education, and Welfare" and inserting in lieu thereof "Human Services".

CHAPTER 2—TELEVISION AND RADIO BROADCASTING

TELEVISION AND RADIO LICENSE TERMS

SEC. 1241. (a) Section 307(d) of the Communications Act of 1934 (47 U.S.C. 307(d)) is amended—

(1) by inserting "television" after "operation of a";

(2) by striking out "three years" each place it appears therein and inserting in lieu thereof "five years";

(3) by inserting "(other than a radio broadcasting station)" after "class of station";

(4) by inserting after the first sentence thereof the following new sentence: "Each license granted for the operation of a radio broadcasting station shall be for a term of not to exceed seven years.";

(5) by inserting "television" after "in the case of" the first place it appears therein;

(6) by inserting "for a term of not to exceed seven years in the case of radio broadcasting station licenses," after "licenses," the first place it appears therein; and

(7) by inserting "for a term of" after "and" the third place it appears therein.

Effective date. 47 USC 307 note.

(b) The amendments made in subsection (a) shall apply to television and radio broadcasting licenses granted or renewed by the Federal Communications Commission after the date of the enactment of this Act.

GRANTING OF CERTAIN INITIAL LICENSES AND PERMITS BASED ON SYSTEM OF RANDOM SELECTION

SEC. 1242. (a) Section 309 of the Communications Act of 1934 (47 U.S.C. 309) is amended by adding at the end thereof the following new subsection:

"(i)(1) If there is more than one applicant for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining the qualifications of each such applicant under section 308(b), shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

47 USC 308.

"(2) The determination of the Commission under paragraph (1) with respect to the qualifications of applicants for an initial license or construction permit shall be made after notice and opportunity for a hearing, except that the provisions of section 409(c)(2) shall not apply in the case of any such determination.

47 USC 409.

Rules.

"(3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection

under this subsection, groups or organizations, or members of groups or organizations, which are underrepresented in the ownership of telecommunications facilities or properties will be granted significant preferences.

"(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

Rules on random selection.

"(4)(A) The Commission, not later than 180 days after the effective date of this subsection, shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

"(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.".

47 USC 309 note.

(b) The Commission shall have authority to use the system of random selection established by the Commission under section 309(i) of the Communications Act of 1934, as added in subsection (a), with respect to any application for an initial license or construction permit which will involve any use of the electromagnetic spectrum and which—

(1) is filed with the Commission after the date of the enactment of this Act; or

(2) is pending before the Commission on such date of enactment but has not been designated for hearing on or before such date of enactment.

SPECIAL REQUIREMENTS RELATING TO BROADCASTING STATION LICENSE APPLICATIONS

SEC. 1243. Section 311 of the Communications Act of 1934 (47 U.S.C. 311) is amended by adding at the end thereof the following new subsection:

"(d)(1) If there are pending before the Commission two or more applications for a license granted for the operation of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications in exchange for the payment of money, or the transfer of assets or any other thing of value by the remaining applicant or applicants.

"(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form, and manner as the Commission shall require.

"(3) The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its license application for the purpose of reaching or carrying out such agreement.

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Congressional and Administrative News

97th Congress—First Session

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Volume 2

LEGISLATIVE HISTORY
[PUBLIC LAWS 97-4 to 97-66]

ST. PAUL, MINN.
WEST PUBLISHING CO.

HOUSE CONFERENCE REPORT NO. 97-208

. . . . . .

[page 653]

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 3982) entitled, "An Act to Provide for Reconciliation Pursuant to Section 301 of the First Concurrent Resolution on the Budget for Fiscal Year 1982," submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the text of the bill struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment.

The joint statement of managers which follows was prepared by the Committees on Jurisdiction, but is arranged by title of the conference agreement. A brief overview by the Committees on the Budget appears at the beginning.

STATEMENT OF BUDGET COMMITTEE MANAGERS

By approving the First Budget Resolution for Fiscal Year 1982, which included reconciliation instructions, Congress continued and expanded its efforts to maintain control over Federal expenditures. Those reconciliation instructions directed fourteen Senate and fifteen House committees to report legislation achieving uprecedented reductions which impact on Federal spending during fiscal years 1981, 1982, 1983 and 1984.

The provisions of the Omnibus Budget Reconciliation Act of 1981 are the culmination of the work of the committees in complying with the reconciliation directives. Real savings have been achieved which compare favorably with the reconciliation bills as passed by the House and Senate.

The managers for the Committees on the Budget wish to acknowledge the extraordinary efforts of the conference participants, particularly the chairmen and ranking Members of the House and Senate committees, in achieving these savings.

What follows in this statement of managers is a title by title explanation of the conference agreement. This explanation has been prepared by the committees which determined the provisions of the conference agreement which are in their separate jurisdictions.

review occasionally brings to light certain matters with respect to a broadcaster's performance that may otherwise have gone undetected. However, the most serious station deficiencies are generally brought to the Commission's attention through complaints filed during the license term. Since this complaint process will continue, the public will have ample opportunity to bring such matters promptly to the Commission's attention. Thus, an extenion of the license term will not lessen the Commission's oversight and enforcement powers necessary to protect the public.

OTHER RADIO AND TELEVISION PROVISIONS

The Senate reconciliation bill contained numerious provisions with respect to the deregulation of radio and television. The Senate receded from its position with respect to the following sections of its bill: 1) Section 444-2(a) extending radio license terms indefinitely; 2) Section 444-2(b) creating new procedures with respect to license revocation; 3) Section 444-4 prohibiting the FCC from requiring radio licensees to:

a) provide news, public affairs, or locally produced programs;
b) adhere to a particular programming format
c) maintain program logs;
d) ascertain needs and interests, of the area served;
e) restrict the length or frequency of commercials;

4) Section 444-4 requiring the Commission to report annually to Congress on the elimination of regulation relating to radio broadcasting; 5) Section 445-3 prohibiting the Commission from considering a competing television broadcast applicant while it is considering whether to renew the existing license; 6) Section 445-3 creating a new standard for television license renewal; 7) Section 445-4 providing that a station be reassigned to states presently without any existing commercial VHF station when a channel assignment becomes available in a neighboring state;

RANDOM SELECTION OF INITIAL LICENSES

The Senate bill included amendments to Section 309 of the Communications Act which permitted the Federal Communications Commission, in its discretion, where there is more than one applicant for a radio or television broadcast frequency that becomes available, to grant the application based on a system of random selection (i.e., lottery) to be developed by the Commission. The conference agreement adds a new subsection to Section 309 directing the FCC to establish rules within 180 days of enactment of this legislation, setting forth the procedures to be followed in any Commission proceeding in which the FCC, in its discretion, decides to grant any initial license or construction permit on the basis of random selection. The conferees intend that this provision may be applied by the Commission to the grant of any license for use of the electromagnetic specturm in which there are mutually exclusive applicants for the same license.

The legislation provides that the Commission is to determine, prior to conducting any random selection procedure, that each applicant who is to be included in the random selection meets the minimum or basic qualifications set forth in Section 308(b) of the

Act. It is the firm intention of the conferrees that Section 309(j)(2) requires the Commission to conduct at most a "paper" hearing in making a determination of minimum qualifications rather than a trial-type hearing. See *U.S. v. Florida East Coast Railway Co.*, 410 U.S. 224, 238-246 (1973). The conferees direct that the Commission expedite its determination of minimum qualifications in order that the random selection proceeding itself not be delayed. The Commission could, for instance, delegate authority to determine such qualifications to the appropriate Bureau Chief. The provisions of Section 409(c)(2) of the Act shall not apply to the Commission's determination of minimum qualifications.

Section 309(j)(3) is added directing the Commission to establish rules and procedures to ensure that significant preferences are given to any groups or organizations, or members of groups or organizations, which are underrepresented in the ownership of telecommunications facilities or properties. It is the firm intention of the conferees that ownership by minorities, such as blacks and hispanics, as well as by women, and ownership by other underrepresented groups, such as labor unions and community organizations, is to be encouraged through the award of significant preferences in any such random selection proceeding. These are groups which are inadequately represented in terms of nationwide telecommunications ownership, and it is the intention of the conferees in establishing a random selection process that the objective of increasing the number of media outlets owned by such persons or groups be met.

The conferees note that the current system (based on comparative proceedings) of awarding licenses where mutually exclusive applicants exist often produces substantial delays and burdensome costs on both the applicant and the Commission. it is the intention of the conferees by authorizing the Commission to conduct random selection of licenses that these costs and burdens be alleviated. By making a determination that all applicants participating in the random selection process meet the Section 308(b) basic qualifications, however, the public continues to be protected from unqualified licensees.

By the establishment of basic qualifications and the elimination of initial comparative hearings, the conferees intend that much of the present delay and expense can be eliminated with no adverse effect on the provision of services to the public.

The conferees wish to emphasize that a random selection proceeding is to be used by the Commission in its discretion, and that the conferees do not intend to discourage the use of the comparative hearing process by the Commission where, due to a sufficiently small number of applicants or for other reasons, a comparative proceeding would better serve the public interest, convenience and necessity.

The conferees note that delays and expense which are often incurred with respect to certain comparative proceedings can, in an of themselves, present a substantial barrier to entry into telecommunications markets by those who are presently unable to incur such costs. Thus, a random selection proceeding will encourage those presently discouraged by these barriers to seek a license award.

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The conferees are particularly concerned with the delay that will result if comparative proceedings are used to award licenses for low-power television service. The Commission has already received over 5,000 applications, most of which are, or will be, mutually exclusive with other applications. Unless alternate procedures are devised, the Commission will have geometric increase in comparative hearings and many years of delay in action on these applications. The conferees note that a matter such as this is ideally suited for the application of random selection procedures. By authorizing the Commission to apply random selection to any license application already submitted, but not yet designated for hearing, it will be possible to process low-power television applications rapidly on a random selection basis.

Section 309(j)(4) directs the Commission, after notice and opportunity for hearing, to prescribe rules establishing a system of random selection. The conferees intend that the Commission will implement this section in accordance with 5 U.S.C. 553.

FRIVOLOUS LICENSE APPLICATIONS

Section 1243 adds a new subsection 311(d) to the Communications Act of 1934. This subsection makes it unlawful, without approval of the FCC, for the applicants for a broadcasting station license to effectuate an agreement whereby one or more of the applicants withdraws their application or applications in exchange for the payment of money, or the transfer of assets or any other item of value from the remaining applicant or applicants.

Subsection 311(d) is intended to prevent a situation in which a person files a frivolous application for a station license in order to harass an incumbent which is applying for renewal of its license (or any other legitimate applicants for the same license), and offers to withdraw the frivolous applications upon payment of money or a transfer of assets by the legitimate applicant. Payment or transfer could be either to the frivolous applicant or to third parties.

Under paragraph (d)(3), the FCC may approve an agreement between or among applicants, as described in paragraph (d)(1), only if the Commission finds that the agreement is consistent with the public intrest, convenience and necessity, and also that no party to the agreement filed its license application for the purpose of reaching or carrying out such an agreement.

ALLOCATION OF VHF TELEVISION STATION TO NEW JERSEY AND DELAWARE

The House conferees wish to note that they argued strongly for an amended version of a provision in the Senate bill which would have provided that a VHF television license be reassigned, if technically feasible, from a neighboring state to New Jersey or Delaware if such license was revoked or denied by the Commission. The Senate would not accept any provision dealing with this issue in the context of the legislation agreed to in this conference. However, the Senate conferees were sympathetic to the situation in New Jersey and Delaware.

UNITED STATES STATUTES AT LARGE

CONTAINING THE

LAWS AND CONCURRENT RESOLUTIONS
ENACTED DURING THE SECOND SESSION OF THE
NINETY-SEVENTH CONGRESS
OF THE UNITED STATES OF AMERICA

1982

AND

PROCLAMATIONS

VOLUME 96

IN TWO PARTS

PART 1

PUBLIC LAWS 97-146 THROUGH 97-301

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1984

Public Law 97-259
97th Congress

An Act

To amend the Communications Act of 1934, and for other purposes.

Sept. 13, 1982
[H.R. 3239]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Communications Act of 1934, amendment.

TITLE I—COMMUNICATIONS AMENDMENTS

Communications Amendments Act of 1982.

SHORT TITLE

SECTION. 101. This title may be cited as the "Communications Amendments Act of 1982".

47 USC 609 note.

FINANCIAL INTERESTS OF MEMBERS AND EMPLOYEES OF FEDERAL COMMUNICATIONS COMMISSION

SEC. 102. Section 4(b) of the Communications Act of 1934 (47 U.S.C. 154(b)) is amended to read as follows:

"(b)(1) Each member of the Commission shall be a citizen of the United States.

"(2)(A) No member of the Commission or person employed by the Commission shall—

Prohibitions.

"(i) be financially interested in any company or other entity engaged in the manufacture or sale of telecommunications equipment which is subject to regulation by the Commission;

"(ii) be financially interested in any company or other entity engaged in the business of communication by wire or radio or in the use of the electromagnetic spectrum;

"(iii) be financially interested in any company or other entity which controls any company or other entity specified in clause (i) or clause (ii), or which derives a significant portion of its total income from ownership of stocks, bonds, or other securities of any such company or other entity; or

"(iv) be employed by, hold any official relation to, or own any stocks, bonds, or other securities of, any person significantly regulated by the Commission under this Act;

except that the prohibitions established in this subparagraph shall apply only to financial interests in any company or other entity which has a significant interest in communications, manufacturing, or sales activities which are subject to regulation by the Commission.

"(B)(i) The Commission shall have authority to waive, from time to time, the application of the prohibitions established in subparagraph (A) to persons employed by the Commission if the Commission determines that the financial interests of a person which are involved in a particular case are minimal, except that such waiver authority shall be subject to the provisions of section 208 of title 18, United States Code. The waiver authority established in this subparagraph shall not apply with respect to members of the Commission.

Waiver authority.

appears therein the following: ", or which the Commission by rule has authorized to operate without a license under section 307(e)(1),".

AUTHORIZATION OF TEMPORARY OPERATIONS

SEC. 114. Section 309(f) of the Communications Act of 1934 (47 U.S.C. 309(f)) is amended—

(1) by striking out "emergency" each place it appears therein and inserting in lieu thereof "temporary";

(2) by striking out "one additional period" and inserting in lieu thereof "additional periods"; and

(3) by striking out "ninety days" and inserting in lieu thereof "180 days".

RANDOM SELECTION SYSTEM FOR CERTAIN LICENSES AND PERMITS

SEC. 115. (a) Section 309(i)(1) of the Communications Act of 1934 (47 U.S.C. 309(i)(1)) is amended— 95 Stat. 736.

(1) by striking out "applicant" the first place it appears therein and inserting in lieu thereof "application"; and

(2) by striking out "the qualifications of each such applicant under section 308(b)" and inserting in lieu thereof "that each such application is acceptable for filing".

(b) Section 309(i)(2) of the Communications Act of 1934 (47 U.S.C. 309(i)(2)) is amended to read as follows:

"(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) and section 308(b). When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law— Hearing.

"(A) adopt procedures for the submission of all or part of the evidence in written form;

"(B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

"(C) omit the determination required by subsection (a) with respect to any application other than the one selected pursuant to paragraph (1).".

(c)(1) Section 309(i)(3)(A) of the Communications Act of 1934 (47 U.S.C. 309(i)(3)(A)) is amended by striking out ", groups" the first place it appears therein, and all that follows through the end thereof, and inserting in lieu thereof the following: "used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.".

(2) Section 309(i)(3) of the Communications Act of 1934 (47 U.S.C. 309(i)(3)) is amended by adding at the end thereof the following new subparagraph:

"(C) For purposes of this paragraph:

"(i) The term 'media of mass communications' includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee. "Media of mass communications."

"(ii) The term 'minority group' includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.". "Minority group."

(d) Section 309(i)(4)(A) of the Communications Act of 1934 (47 U.S.C. 309(i)(4)(A)) is amended by striking out "effective date of this subsection" and inserting in lieu thereof "date of the enactment of the Communications Technical Amendments Act of 1982".

AGREEMENTS RELATING TO WITHDRAWAL OF CERTAIN APPLICATIONS

SEC. 116. (a) Section 311(c)(3) of the Communications Act of 1934 (47 U.S.C. 311(c)(3)) is amended by striking out "the agreement" the second place it appears therein and all that follows through the end thereof and inserting in lieu thereof the following: "(A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.".

(b) Section 311(d)(1) of the Communications Act of 1934 (47 U.S.C. 311(d)(1)) is amended by striking out "two or more" and all that follows through "station" and inserting in lieu thereof the following: "an application for the renewal of a license granted for the operation of a broadcasting station and one or more applications for a construction permit relating to such station". 95 Stat. 737.

(c) Section 311(d)(3) of the Communications Act of 1934 (47 U.S.C. 311(d)(3)) is amended by striking out "license".

WILLFUL OR REPEATED VIOLATIONS

SEC. 117. Section 312 of the Communications Act of 1934 (47 U.S.C. 312) is amended by adding at the end thereof the following new subsection: Definitions.

"(f) For purposes of this section:

"(1) The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

"(2) The term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.".

APPLICABILITY OF CONSTRUCTION PERMIT REQUIREMENTS TO CERTAIN STATIONS

SEC. 118. Section 319(a) of the Communications Act of 1934 (47 U.S.C. 319(a)) is amended by striking out "the construction of which is begun or is continued after this Act takes effect,".

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Convened January 25, 1982

The House Adjourned December 21, 1982
and the Senate Adjourned
December 23, 1982

Volume 3

LEGISLATIVE HISTORY
[PUBLIC LAWS 97-249 to 97-364]

ST. PAUL, MINN.
WEST PUBLISHING CO.

COMMUNICATIONS AMENDMENTS ACT
P.L. 97-259

HOUSE CONFERENCE REPORT NO. 97-765

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[page 17]

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 3239) to amend the Communications Act of 1934 to authorize appropriations for the administration of such Act, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the text of the bill struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

TITLE I

SHORT TITLE

House bill

The House bill provided that the bill may be cited as the "Federal Communications Commission Authorization Act of 1981."

Senate amendment

The Senate amendment provided that this title may be cited as the "Communications Amendments Act of 1982."

Conference substitute

The conference substitute adopts the Senate provision.

While the Communications Act of 1934 has been amended several times since its initial passage, it has never received a thorough technical overhaul and clean-up. The Act still contains numerous instances of obsolete language, while imposing regulatory requirements and responsibilities upon the FCC which are no longer necessary in light of advancements in technology and changed circumstances.

While many of the provisions of the Conference Substitute are merely technical revisions of existing law, several provisions permit the FCC to have greater flexibility in reorganizing staff, in carrying out its duties, and in reducing the amount of unnecessary paperwork.

The Conferees note that requiring the Commission to find the applicant selected by the lottery fully qualified prior to the grant of the license to that applicant protects the public from unqualified licensees, while affording the Commission the relief from the burden of having to pass on the full range of qualifications of every applicant. As with the use of non-ALJs to conduct hearings, the post-selection assessment of qualifications process is strictly limited to the lottery context and should not be utilized in the traditional comparative process.

Application of preferences in a random selection system.—It is the firm intent of the Conferees that traditional Commission objectives designed to promote the diversification of control of the media of mass communications be incorporated in the administration of a lottery system under section 309(i), as amended by this legislation. The Commission's application of its Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965), has resulted in significant comparative advantages to minority-controlled applicants and to applicants with a low degree of ownership interest in mass communications media. While the degree of advantage, merit, or preference heretofore awarded to such applicants need not be precisely duplicated in the administration of a random selection system, the Conferees expect that the Commission's lottery rules will provide significant preferences to applicants (especially those who are minority-controlled), the grant to whom of the license or permit sought would increase the diversification of the media of mass communications. The Conferees intend that two distinct diversity preferences be applied where appropriate: a media ownership preference and a minority ownership preference:

The underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of programming content. This diversity principle is grounded in the First Amendment, as illuminated in a line of cases in large part stemming from *Associated Press* v. *United States*, where the Supreme Court stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." 326 U.S. 1, 20 (1945). Thus, in finding that the "public interest, convenience, and necessity" would be served by granting a given mass communications media license, "the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it." *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1213 n. 36 (D.C. Cir. 1971).

The nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts. For example, in promulgating its "concentration of control" regulations, the Commission stated that "the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest." Amendment of Sections 3.35, 3.240, and 3.636, Report and Order, 18 F.C.C. 288 (1953), aff'd, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192[1](1956). In its rule-

1. 76 S.Ct. 763, 100 L.Ed. 1081.

making on low power television, the Commission noted that it has received expressions of interest from minorities wishing to develop new services and that it "specifically encourages this interest, and fully intends that the inauguration of this new broadcast service be the occasion for assuring enhanced diversity of ownership and of viewpoints in television broadcasting." Low Power Television Broadcasting, Notice of Proposed Rulemaking, 82 F.C.C. 2d 47, 77 (1980). In *TV 9, Inc. v. FCC*, a landmark case dealing with comparative merit for minority applicants, the court stated "that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved significantly influential with respect to editorial comment and the presentation of news." 495 F.2d 929, 938 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974).

Common carrier licensees are often not engaged in the provision of information or mass media services over their facilities which they control. When common carrier licensees do exert such control, by definition they do not exclusively control the content of the information or programming which is transmitted over their facilities. Thus, Section 309(i), as amended by this bill, only requires significant preferences to be applied to licenses or construction permits for any media of mass communications. This permits the Commission to use a lottery without preferences for services such as common carrier "beepers," for which there is a large back-log of applications.

A question arises as to the administration of a lottery in services which may be neither clearly common carrier nor broadcast entities (such as multipoint distribution service), or services in which the applicant may be able to self-select either common carrier or broadcast status (such as the Commission's treatment of the direct broadcast satellite service). The Conferees intend that the Commission apply significant preferences, if it decides to use a lottery system for these services, to the extent that the licensees have the ability to provide under their direct editorial control a substantial proportion of the programming or other information services over the licensed facilities. If such services are treated by the Commission in the future strictly as common carrier services with no ability on the part of the licensee to exercise direct editorial control over a substantial proportion of the programing offered over its facilities, no preferences need be applied in using a lottery system for those services.

Characteristics of the preferences.—One important factor in diversifying the media of mass communications is the degree of applicants' ownership interest in other media of mass communications. The definition of media of mass communications relevant here includes the entities listed in section 309(i)(3)(C)(i), as amended by this Act, plus daily newspapers, which the Commission has long regarded as important in considering the diversification of the media. See, e.g., Multiple Ownership of Standard, FM and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, modified, Memorandum Report and Order, 53 F.C.C.2d 589 (1975), aff'd sub nom., *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775[2](1978); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-95 (1965).

2. 98 S.Ct. 2096, 56 L.Ed.2d 697.

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To the degree an applicant for a license or permit for the media of mass communications has controlling interest in no other, or few other, media entities, the policy of diversifying media ownership would be promoted by the grant of the license to such an applicant. Thus, the Conferees intend that in the administration of a lottery to be used for granting licenses or construction permits for any media of mass communications, the Commission award a significant media ownership preference to those applicants whose owners control no other media of mass communications. The Conferees believe that the amount of this preference must be no less than a fixed relative preference of 2:1 for each such application. Thus, each such situated applicant must be awarded a preference so that its chances of being granted the license in a lottery are at least doubled from what its chances would be if a straight random selection process without preferences were conducted. Similarly, a media ownership preference should be awarded to those applicants whose owners, when aggregated, have controlling interest (over 50%) in 1, 2, or 3 other media of mass communications. The Conferees believe that the amount of this preference must be no less than a fixed relative preference of 1.5:1 for each such application. No media ownership preference should be awarded to applicants whose owners, when aggregated, have controlling interest (over 50%) in more than 3 other media of mass communications properties.

The Conferees are concerned that the objectives of this media ownership preference scheme might be diluted where there are large numbers of applicants in a given use of a lottery. To help insure that these preferences have appreciable impact on the results of the lottery, adjustments in the preferences awarded may be required where there is a relatively large number of total applicants compared to the number of applicants deserving of the media ownership preference.

The Conferees intend that the Commission assign applicants to groups based on the number of other media of mass communications owned. A specific multiplier (preference) factor should be applied to each applicant in a given group, the factor varying inversely with the number of media of mass communications owned by the applicants in that particular group. After the appropriate preference factor is applied to each preferred applicant, the overall likelihood of selecting an applicant from one of the preferred groups should be calculated. If this probability does not meet or exceed .4, the individual applicant selection probabilities should be recomputed to bring the combined preferred group probabilities to no less than. 4 (See Administering the System of Random Selection, infra).

A second important factor in diversifying the media of mass communications is the degree of applicants' ownership interest in other media of mass communications which are in, or close to, the community being applied for. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395 (1965). The Commission has recognized the importance of this factor in promulgating local cross-ownership rules barring the common ownership of a VHF television station and an aural (AM or FM radio) station in the same community, Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 F.C.C. 2d 306 (1970), modified, Memorandum Opinion and Order, 28 F.C.C. 2d 662

1971), and barring daily newspaper—broadcast station combinations under common ownership in the same community. Multiple Ownership of Standard, FM and Television Broadcast Stations, Second Report and Order, 50, F.C.C. 2d 1046, modified, Memorandum Report and Order, 53 F.C.C. 2d 589 (1975), aff'd sub nom. *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

The Conferees strongly believe that the avoidance of local ownership concentration should continue to be a factor of major significance in promoting diversity in the licensing process. Where an applicant for a license or permit has controlling interest over 50 percent in any other medium of mass communications which would be co-located with the licensed facility sought, it would not promote diversity to give such an applicant a preferred status relative to other applicants. Thus, in the administration of a lottery system to be used for licenses or permits in the media of mass communications, no media ownership preference should be awarded to any applicant whose owners, when aggregated, have controlling interest (over 50 percent) in any medium of mass communications which is licensed to serve, franchised to serve (in th case of a cable television system), or primarily serves (in the case of a daily newspaper) the community of license for which of the grant is sought.

The Conferees expect that the Commission will make certification as to whether or not an applicant has a controlling interest in any media of mass communications in the community of license of the grant sought a prerequisite for an acceptable application for a license or permit for a medium of mass communications. Applicants who do have such ownership interests should be ineligible for a media ownership preference, notwithstanding the possibility that they might otherwise receive a preference by virtue of owning only a few media of mass communications. In sum, awards of licenses which would increase local media ownership concentration, by definition would not further the goal of diversifying media ownership, and thus the Conferees intend that such applications not be eligible for a diversity preference.

A third important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities—groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so. It is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public. The Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well. We note that the National Association of Broadcasters recently reported that of 8,748 commercial broadcast stations in existence in December 1981, only 164, or less than two percent, were minority owned. Similarly, only 32 of

the 1,386 noncommercial stations, slightly over two percent, were minority owned.

One means of remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications, is to provide that a significant preference be awarded to minority-controlled applicants in FCC licensing proceedings for the media of mass communications. The narrowly-drawn preference scheme established in section 309(i), as it is amended by this legislation, is intended to achieve such a purpose. Evidence of the need for such preferential treatment has been amply demonstrated by the Commission, the Congress, and the courts. See, in this regard, Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978); FCC Minority Ownership Taskforce, Report on Minority Ownership in Broadcasting (May 17, 1978) at 3, 7-9; and *Fullilove* v. *Klutznick*, 448 U.S. 448[3] (1980), and reports cited therein at 467 n.55. As the court stated in *Citizens Communications Center* v. *FCC*:

> The Commission . . . may also seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage, and expand diversity of approach and viewpoint. . . . As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies.

447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971) (citation omitted).

The Conferees intend that in the administration of a lottery to be used for granting licenses or construction permits for any media of mass communications, the Commission award a significant minority ownership preference to those applicants, a majority of whose ownership interests are held by a member or members of a minority group. The Conferees believe that the amount of this preference must be no less than a fixed relative preference of 2:1 for each such application. For purposes of becoming eligible for this minority ownership preference, individuals who are participants in a group, partnership or corporate entities and who are members of different minority or ethnic groups should be allowed to aggregate their ownership interests to achieve a majority interest in any given application.

It is clear that the current comparative hearing process has not resulted in the award of significant numbers of licenses to minority groups. Many minority applicants are simply unable to participate in comparative hearings which often take a considerable period of time and require subtantial economic resources. The Conferees believe that a lottery preference scheme will greatly speed the process of initial licensing awards, and will permit not only greater numbers of minority groups to apply for licenses, but also will result in the award of a greater proportion of available licenses to minorities than has been the case to date.

It should be noted that such groups as women, labor unions, and community organizations which were mentioned in the legislative

3. 100 S.Ct. 2758, 65 L.Ed.2d 902.

history of the lottery statute that was originally adopted. Conference Report on H.R. 3982, Omnibus Budget Reconciliation Act of 1981—Book 2, H.R. Rep. No. 97-208, 97th Cong., 1st Sess. 897 (1981), are all significantly underrepresented in the ownership of telecommunications facilities. Such applicant groups would, of course, be eligible for both media ownership and minority ownership preferences if they meet the eligibility guidelines. The Conferees expect that such groups will also substantially benefit from this lottery preference scheme, and, consequently, the American public will benefit by having access to a wider diversity of information sources.

The operative definition of minority group is found in section 309(i)(3)(C)(ii), as amended by this bill. It is the Conferees intention that the definitions in Office of Management and Budget Statistical Policy Directive No. 15, "Race and Ethnic Standards for Federal Statistics and Administrative Reporting," be utilized for guidance with regard to any dispute as to an individual's membership in a named group.

The Conferees direct the Commission to report to the Congress annually on the effect of section 309(i)(3) and whether it serves the purposes stated. See generally Fullilove v. Klutznick, 448 U.S. 448, 510, 513 (1980). This report should include a statistical breakdown of the characteristics of applicants involved in lottery proceedings, those receiving preferences, and those actually awarded licenses.

The Conferees intend that both a media ownership preference and a minority ownership preference will be available to all eligible applicants. Thus, for example, an applicant, a majority of which is owned by minorities, and whose owners have no controlling ownership interests in the media of mass communications, would receive no less than a cumulative, 3:1 preference over an applicant without preferences. Moreover, an applicant, a majority of which is owned by minorities, but whose owners have controlling interest in four media of mass communications properties or a medium of mass communications serving the community of license of the grant sought, would still receive a minority ownership preference (though not being eligible for a media ownership preference).

With respect to both the media ownership and minority ownership preferences, the Conferees expect that the Commission shall evaluate ownership in terms of the beneficial owners of the corporation, or the partners in the case of a partnership. Similarly, trusts will be evaluated in terms of the identity of the beneficiary.

The Conferees expect that the preferences which will be awarded in the administration of a lottery will result in a real and substantial increase in the diversity of ownership in the media of mass communications and consequent diversification of media viewpoints. The Conferees note that this carefully designed preference scheme could be undermined by the rapid re-assignment or transfer of stations, construction permits, or licenses granted by a lottery. Thus, it is the firm intent of the Conferees that for any mass communications media service in which the Commission determines use of a lottery is appropriate, it should retain its present anti-trafficking rules (47 C.F.R. 73.3597 (1981)) or devise similar protections to help ensure that the very purposes sought to be achieved by the preference scheme be fulfilled. Moreover, the Com-

mission should require that the applicant that is actually awarded the license certifies that they have not entered into any agreement, explicit or implicit, to transfer to another party after a period of time any station construction permit or license awarded. If those eligible for preferences were simply applying for licenses for the purpose of obtaining a quick profit on the sale of the station once the license is awarded, the entire lottery preference mechanism would be undermined.

Administering the system of random selection.—The Commission's administration of the random selection system will differ depending on whether the licenses are to be granted for the media of mass communications or for non-media services. The lottery procedure for the latter is extremely simple, with each applicant for a given license receiving a selection probability of 1/x, where x equals the total number of applicants.

The random selection system for mass communications media licenses, on the other hand, must take into account preferences for ownership of few or no mass communications media entities, and preferences for minority ownership, along with the total number of applicants for a given license.

The Conferees intend that the media ownership preference be computed prior to the minority ownership preference. Those applicants with no controlling ownership in mass communications media should receive a fixed relative preference of 2:1; applicants with controlling interest in one, two, or three mass communications media entities should receive a fixed relative preference of 1.5:1. Applicants with controlling interest in more than three mass communications media entities or in at least one entity serving the city of license should receive no media ownership preference. Following the award of media ownership preferences (where applicable), each applicant's selection probability should be normalized (*i.e.*, adjusted to reflect its actual probability of being selected), taking into account the total number of applicants in the lottery.

The Conferees are concerned that their objective of increasing media diversity by granting preferences in the administration of a lottery system will be diluted in instances where the number of applicants for a given license is large. It is important to ensure that the media ownership preference will have an appreciable impact on the results of the selection process. The award of preferences, therefore, is not only intended to ensure that the lottery process is conducted in a way which guarantees the consideration of certain criteria which are of primary significance in the comparative hearing process, but it is also intended to create a process which is highly outcome-oriented in terms of furthering the actual granting of licenses to those applicants who would most further diversity objectives.

Thus, the Commission must ensure that the sum of the selection probabilities of all applicants deserving of a media ownership preference be no less than .40 for any given instance in which the lottery is being used, even if after the award of the media ownership preference the aggregated selection probabilities of all such applicants awarded this preference totals less than 40 percent. The Conferees intend that this be accomplished by adjusting the normalized selection probabilities of each applicant deserving of a media own-

II

98TH CONGRESS
2D SESSION

S. 2962

To amend the Communications Act of 1934 to promote diversity in broadcasting.

IN THE SENATE OF THE UNITED STATES

AUGUST 10 (legislative day, AUGUST 6), 1984

Mr. WILSON (for himself, Mr. INOUYE, Mr. HATCH, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To amend the Communications Act of 1934 to promote diversity in broadcasting.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Diversity in Broadcasting Act of 1984".

SEC. 2. Part I of title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.) is amended by adding at the end thereof the following new section:

"RESTRICTIONS ON OWNERSHIP

"SEC. 333. (a) The Commission may not appove an application for a television broadcasting station license or for